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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TAMMY JEAN BEAMS,

Defendant and Appellant.

F049357

(Super. Ct. No. VCF149075)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Richard Jay Moller, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Louis M. Vasquez and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*]Before Harris, Acting P.J., Levy, J., and Dawson, J.

INTRODUCTION

Appellant, Tammy Jean Beams, was found guilty on October 27, 2005, after a jury trial, of maintaining a place for using controlled substances (Health & Saf. Code, § 11366, count one), possession of a hypodermic needle (Bus. & Prof. Code, § 4140, count two), possession of a cocaine or methamphetamine pipe (Health & Saf. Code, § 11364, count three), and misdemeanor possession of marijuana (Health & Saf. Code, § 11357, subd. (b), count four). On December 5, 2005, the trial court placed appellant on felony probation for three years upon various terms and conditions.

Appellant contends on appeal that the trial court improperly excluded evidence of a medical marijuana recommendation from her physician. Appellant further contends the prosecutor committed misconduct by misinforming the jury that she did not have a medical marijuana recommendation. We find the trial court's exclusion of exculpatory evidence to be prejudicial error with regard to her conviction for possession of marijuana. We do not find any error, however, with regard to appellant's conviction for maintaining a residence for the distribution of narcotics or for possession of a cocaine or methamphetamine pipe.

FACTS

Prosecution Case

On October 20, 2004, Tulare County Sheriff's Detective David De La Cruz served a search warrant on appellant's home on Jacob Street in Visalia. De La Cruz entered the northwest bedroom used by Beth Skillian and James Climer and detained the two. Appellant was in a bedroom at the northeast corner of the house. Investigators found six syringes in the house. One syringe was located in a trunk in appellant's bedroom and a second was inside Climer's jacket pocket. Four more syringes were found in a plastic bag inside a baby bottle, on a fan, underneath a mattress, and in a blue, plastic container in the Skillian-Climer bedroom. Such syringes are commonly used for using illegal narcotics.

Deputies found a white powdery substance in a plastic bindle in the Skillian-Climer bedroom and a glass pipe in a cabinet. The pipe appeared consistent with one being used to smoke a controlled substance such as methamphetamine. A brown pipe found in Climer's jacket pocket with the syringe had the strong odor of marijuana.

Investigators found marijuana in appellant's bedroom and in the living room. They also found a glass pipe for smoking marijuana on a dresser in appellant's bedroom. The pipe had a leafy residue and smelled like marijuana.

Investigators found tinfoil and residue on top of the refrigerator. There was a white residue on the tinfoil which was consistent with the residue on top of the refrigerator. There was a plastic pen body found on top of the refrigerator with the interior removed. It also had a residue consistent with the residue on the refrigerator and on the tinfoil as well as in the baggie found in the Skillian-Climer bedroom. Investigators found a gray mirror with a white powdery substance on it along the north wall of the Skillian-Climer bedroom. The powder on the mirror and the refrigerator looked like cocaine.

There was a metal spoon on a bathroom shelf. Spoons can be used to heat up controlled substances such as heroin and cocaine to turn them into injectable liquids. A laboratory analysis showed the bindle in the Skillian-Climer bedroom was cocaine.

After De La Cruz gave appellant her *Miranda* rights, she agreed to talk.[1] Appellant told De La Cruz there were numerous parties at the home involving the use of narcotics. People using drugs had been using the house for approximately eight months. Appellant explained that Climer had been staying in the home about one month. People visited Climer for drug parties.

Appellant told De La Cruz she did not want people partying in her home any longer. She was trying to get away from the partying but was weak and would start doing

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

it again if she stayed around. Appellant said she did not like methamphetamine and had been staying in her sister's home much of the time prior to her arrest. Appellant saw people come into her home to get narcotics but she never saw money change hands. Visitors would sometimes bring Climer large quantities of narcotics.

Appellant admitted the syringe found in the trunk in her room was hers but said, " 'God knows how long it has been in there.' " Appellant explained she used the needle for "slamming," which means injecting oneself with narcotics. Appellant told De La Cruz she would take full responsibility for marijuana found in the living room where people had been partying. She admitted the baggie, seed, and pipe found in her room belonged to her. Appellant took full responsibility for the marijuana that was found.

Appellant did not know what was in the Skillian-Climer bedroom. She explained that if any methamphetamine was found there, it did not belong to her. Appellant said she had not taken any methamphetamine in a couple of weeks. Appellant also did not take responsibility for the powder found on top of the refrigerator because many people had been in and out of the home. Appellant identified the powder as methamphetamine.

Skillian and appellant were transported by Detective Tom Sherrill. Appellant said to Skillian that she did not care if anyone used narcotics in her house but she did not want anyone to sell narcotics there.

Defense Case

Beverly Keith is appellant's biological mother. Keith testified that she injected a blood thinner called Livenox. When she was at appellant's home, she would sometimes have appellant inject her. Keith would put the used syringes into a red box and pick them up about once a month. Keith explained it was possible that some of the syringes may not have made it into the container.

Keith said she did not tell a police officer that the needle found in appellant's room was her needle. Keith never talked to a police officer and was unaware appellant had been charged with possession of a hypodermic needle. When shown pictures of the

needles retrieved from appellant's home, Keith picked one that she thought was hers, but she was not positive because it did not have a band saying "Livenox" on it.

Appellant testified that she had a medical marijuana card at the NorCal Medical Center in Bakersfield, a medical marijuana prescribing clinic. To obtain the card, a patient provides the doctor with the information showing the necessity for the card. The doctor then provides the card. Appellant qualified for the card because she has a bad gall bladder.[2]

Appellant explained she did not have her card because when it was prepared she did not have a car to pick it up. Appellant conceded she had opportunities to pick up the card but had failed to do so. Although she had a previous card, appellant could not recall where it was. Appellant did not tell sheriff's deputies that she had a medical marijuana card. When asked on an Inmate Screening Form while being booked into jail, appellant answered no to a question concerning whether she was under a doctor's care and whether she took any medications. Appellant answered yes to a question concerning whether she used methamphetamine every day. She denied having other health problems.

Appellant stated De La Cruz never asked her whether she had a marijuana card. In February 2004, a deputy asked appellant if she took any medication. She probably told him she did not although she thought she already had a medical marijuana card. Appellant did not consider taking medical marijuana to be the same as taking prescription medications because she did not smoke it all of the time, but only when her stomach was badly hurting. Also, she had not smoked any recently.

Appellant admitted telling De La Cruz she would take responsibility for everything found in her home. She did not know how the syringe came to be inside her

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[2] At the commencement of trial, appellant attempted to submit a document entitled "A Physician's Recommendation for Therapeutic Cannabis" and a prescription for hypodermic needles for Beverly Keith. The court excluded both items from evidence at trial on the prosecutor's objection because the court could conceive of no reason for the documents not to have been submitted earlier.

trunk or whether it belonged to Keith. A deputy told appellant the syringe was different from other syringes found in the residence which led her to believe it was Keith's syringe. Appellant admitted the marijuana pipe found in her room was hers and that she used it to smoke her medical marijuana.

Although appellant was generally willing to take responsibility for items found in her home, she denied responsbility for anything in the Skillian-Climer bedroom because she did know who had been there and what was happening in the room. Appellant told De La Cruz there were people associated with Skillian who came into the house to use drugs and appellant did not kick them out because the repercussions of doing this would have been worse than letting them stay and use drugs. Appellant feared they would return to steal things from her, or worse. Appellant did not have the intent to open her home up for people to use drugs.

Appellant told investigators that the powder on top of the refrigerator was probably flour because she had not cleaned it in months. Appellant acknowledged telling De La Cruz she slammed methamphetamine, but explained that at the time of her arrest she had not done so for at least a month. She did see Skillian slam once and jumped on her because appellant did not want this kind of drug use in her home. Appellant denied telling investigators there were mass quantities of drugs being exchanged in her home. Smaller quantities were being used by appellant and her boyfriend prior to his departure about a month earlier.

Rebuttal Evidence

Detective De La Cruz testified that appellant never said the syringe belonged to Keith. Appellant admitted to him that the syringe found in the trunk was hers. Appellant never said the white residue on the refrigerator was flour, she said it was methamphetamine. De La Cruz explained that while appellant did not assert ownership of the methamphetamine found on the refrigerator, she said she would take responsibility for it.

DISCUSSION

Appellant contends she was deprived of her due process right to a fair trial because the trial court excluded evidence of a physician's recommendation for therapeutic cannabis. While appellant was allowed to present evidence of having a medical marijuana card, she was not allowed to place the actual card in evidence. She asserts prejudice as to counts one, three, and four. As we explain, the trial court's exclusion of this document was prejudicial concerning the possession of the marijuana allegation, but not with regard to the allegations that appellant maintained a residence for the distribution of narcotics (count one) and possessed paraphernalia for using cocaine or methamphetamine (count three).

C***ounts One and Three***

Whether appellant had a document relating to medical use of marijuana is irrelevant in the context of the instant action concerning maintenance of a residence for distributing illegal narcotics or using paraphernalia for cocaine and methamphetamine. The information alleged in count one that the residence was maintained to distribute methamphetamine and cocaine. The closing arguments to the jury by the prosecution and the defense as to both counts specifically focused on whether appellant was involved in, or permitted, the distribution of methamphetamine and cocaine.

Neither attorney argued that the distribution of marijuana was occurring from the residence. The prosecutor notes at page 317 of the reporter's transcript that appellant was maintaining a "crack house." Defense counsel notes at page 336 of the reporter's transcript that his client had to have the specific intent in count one to distribute methamphetamine or cocaine. Outside the presence of the jury and just prior to the instructional phase of trial, the trial court noted that the marijuana medical authorization does not apply to count one because the prosecution's allegation and theory is that appellant maintained the residence to distribute methamphetamine and cocaine. Defense

counsel concurred with the trial court's statement and noted it was consistent with the way he made his closing argument.

In the prosecutor's final summation to the jury, he explained that appellant lived in the home eight years. It was her house. Skillian lived there only a month. According to the prosecutor, appellant had the specific intent to sell, give away, or use controlled substances, cocaine and methamphetamine on a continuing basis.

The trial court's instruction concerning count one was:

> "The defendant is accused in Count 1 with having committed a violation of Health & Safety Code Section 11366, a crime. Every person who opens or maintains any place for the purpose of unlawfully selling, giving away, or using any controlled substance such as cocaine or methamphetamine is guilty of a violation of Health & Safety Code Section 11366, a crime.
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> "In order to prove this crime, each of the following two elements must be proved: One, a person opened or maintained any place; and two, that the person did so with the specific intent to sell, give away, or use cocaine or methamphetamine on a repetitive or continuing basis."

Appellant argues count one "was not limited to the use of cocaine and methamphetamine in the first part of the instruction, but was limited in the second part." According to appellant, this "ambiguity could have permitted the jury to find appellant guilty of this charge solely on the marijuana present in her home." Part one of the instruction talks about using "any controlled substance such as cocaine or methamphetamine."

Although the first part of this instruction is slightly ambiguous, cocaine and methamphetamine are specifically mentioned while marijuana is not mentioned at all. More importantly, the second part of the instruction, which sets forth the elements of the crime, expressly requires distribution on a "repetitive or continuing basis" of "cocaine or methamphetamine." Reading the instruction as a whole, it is clear that for the jury to

conclude appellant violated count one, it would have had to find she was distributing cocaine or methamphetamine, not marijuana.[3]

On appeal, the issue is whether the jury understood the instructions in an erroneous way, given the entirety of the instructions and all other relevant circumstances. (*People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) It is well established in California that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction. (*People v. Burgener* (1986) 41 Cal.3d 505, 538 [disapproved on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 756].) "The meaning of instructions is no longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276.)

The instructions to the jury required it to find appellant was maintaining a home and using narcotics paraphernalia for cocaine or methamphetamine. Marijuana is not referred to in the jury instructions for count one or count three. We find a jury following the instructions, read and understood as a whole, would not have found that appellant's use of marijuana would have satisfied any element of count one or count three.

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3 The instruction for count three also focused on use of cocaine or methamphetamine. It did not refer to marijuana. In relevant part, it stated: "Every person who possesses an opium pipe or any device, contrivance, instrument, or paraphernalia used for or unlawfully injecting or smoking a controlled substance such as cocaine or methamphetamine is guilty of a violation of Health & Safety Code Section 11364, a misdemeanor." The analysis we apply to count one is equally pertinent to count three. Furthermore, the prosecutor argued at page 331 of the reporter's transcript that possession of a smoking device for marijuana was not a crime, only possession of such a device for purposes of smoking a controlled substance. Finally, the court specifically instructed the jury that "[i]t is not unlawful to possess any device or paraphernalia used for smoking marijuana."

Count Four

Appellant's contention that she was not permitted to present exculpatory evidence concerning the medical use of cannabis is relevant to her conviction in count four for possession of marijuana.

There is no doubt appellant proffered "A Physician's Recommendation for Therapeutic Cannabis" at the beginning of trial. In doing so, she did not comply with reciprocal discovery rules, especially the requirement to disclose information 30 days prior to trial. (Pen. Code, § 1054.7.) Sanctions in the form of preclusion of evidence, however, may be imposed against a criminal defendant only for the most egregious discovery abuse. The sanction should be reserved for the most willful and deliberate violation motivated by the desire to obtain a tactical advantage. (*People v. Edwards* (1993) 17 Cal.App.4th 1248, 1263.) The trial court should balance the consequence to the truth-finding process because the consequence of exclusion may so distort that process as to undermine its reliability. (*People v. Gonzales* (1994) 22 Cal.App.4th 1744, 1758.)

Appellant's attempt to provide medical evidence to corroborate her own testimony at trial was crucial to the truth-finding process. Other sanctions short of exclusion should have been employed by the trial court.

In closing argument to the jury, defense counsel specifically stated that appellant had a medical marijuana card. On appeal, respondent argues that the defense was limited to the existence of a voluntary program for the issuance of medical marijuana cards pursuant to Health and Safety Code section 11362.71 rather than a written or oral recommendation of a physician pursuant to Health and Safety Code section 11362.5, subdivision (d). Respondent further argues that under the instructions given, "it did not matter whether or not appellant had a recommendation or approval from her doctor to smoke marijuana -- only whether she had a valid marijuana use card."

Respondent's argument, however, misses the point made by appellant. She tried to submit into evidence "A Physician's Recommendation for Therapeutic Cannabis." The court excluded the evidence.[4] Whether defense counsel simply misspoke during closing argument or whether he was referring to a separate medical marijuana use card does not affect the trial court's ruling or the prejudice suffered by appellant.

The factual issue in question is close. If the jury had been given the opportunity to evaluate the medical recommendation, it is reasonably probable it could have found this evidence exculpatory and acquitted appellant of count four.[5] Under either the *Watson* or the *Chapman* standard of review, the court's exclusion of the proffered evidence was not harmless.[6]

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[4] Unfortunately, the trial court complicated the issue of the nature of the document appellant sought to introduce into evidence. The clerk's minutes of the first day of trial indicate at page 51 that the trial court denied appellant's motion to admit a prescription for medical marijuana and, after having the exhibit marked, returned it to counsel. This procedure makes it impossible to evaluate the document on appeal. The better procedure for the trial court to follow in future cases in which it does not admit the evidence would be to mark the exhibit and to accept it as received so that it remains in the record for appellate review. If appellant needed the physician's recommendation returned to her, the court should have had a copy entered into the record to preserve the record on appeal.

[5] We do not reach the issue of whether to apply the standard of appellate review in *People* v. *Watson* (1956) 46 Cal.2d 818, 836 or that of *Chapman v. California* (1967) 386 U.S. 18. The question of which standard of review to apply is not always clear. (See *People v. Lawson* (2005) 131 Cal.App.4th 1242, 1249, fn. 7.) Even under the less rigorous *Watson* standard of appellate review, we cannot find the error harmless in the instant action.

[6] We do not reach appellant's allegation of prosecutorial misconduct because this issue is related to comments by the prosecutor questioning the existence of a medical marijuana card or prescription. We found that the existence of a medical marijuana prescription had no impact on the jury's ability to fairly evaluate evidence on counts one and three. The same analysis applies to any argument by the prosecutor concerning the absence of a medical marijuana card. Because we are reversing appellant's conviction on count four on other grounds, we need not analyze the effect, if any, of the prosecutor's comments in the context of that count.

DISPOSITION

Appellant's conviction on count four is reversed. The judgment is otherwise affirmed.